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In The
Supreme Court of the United States

October Term, 1982

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ADAMS CENTRAL SCHOOL DISTRICT NO. 090,
ADAMS COUNTY, NEBRASKA, AND EDUCATIONAL
SERVICE UNIT NO. 9,

Petitioners,

vs.

MARVIN DEIST AND MYRTLE DEIST,
Respondents.

IMPLEADED WITH NEBRASKA DEPARTMENT
OF EDUCATION,
Respondent.

---O---

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA**

---O---

ROBERT A. BARLOW, Counsel of Record, and
JOHN F. RECKNOR of
BARLOW, JOHNSON, DEMARS & FLODMAN
P.O. Box 81686
Lincoln, Nebraska 68501
(402) 475-4240

*Attorneys for Petitioners
Adams Central School District No. 090,
Adams County, Nebraska,
and Educational Service Unit No. 9*

QUESTIONS PRESENTED FOR REVIEW

1. Does the Education Of All Handicapped Children Act, 20 U.S.C. §§ 1401 *et seq.*, allow the granting of money damages to the parents of a handicapped child, who assert successfully that the resident school district of the handicapped child has failed to provide a free appropriate education for the child?

2. Are money damages and compensatory education identical elements of damage in a case under 20 U.S.C. 1401 §§ *et seq.*, when the parent of a handicapped child successfully asserts a resident school district has not provided a free appropriate public education for the handicapped child?

LIST OF PARTIES

Adams Central School District No. 090, Adams County, Nebraska, and Educational Service Unit No. 9, Petitioners.

Marvin Deist and Myrtle Deist, Respondents.

Nebraska Department of Education, Respondent.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
List of Parties	i
Table of Contents	ii
Table of Authorities	iii
Opinions	2
Jurisdiction	2
Applicable Constitutional Provisions, Treaties, Statutes, Regulations and Ordinances	2
Statement Of The Case	2
Argument	6
Conclusion	14
Appendix	A-1, B-1, C-1

CASES CITED

	Page
Adams Central School District No. 90 v. Deist, 214 Neb. 307, ____ N.W.2d ____ (1983)	2, 8, 10, 12, 13
Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981)	9, 12
Board of Education of Hendrick Hudson Central School District v. Rowley, ____ U.S. ____, 102 S. Ct. 3034 (1982)	7, 9
Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1981)	7, 9, 10, 11, 12, 13
Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1981)	6, 7, 9, 10
Pennhurst State School and Hospital v. Halderman, 451 U.S. 101, S. Ct. 1531 (1981)	7, 8, 9, 10
Stemple v. Board of Education, 623 F.2d 893 (4th Cir. 1980)	6, 7

CONSTITUTION CITED

Constitution of the United States, Eleventh Amendment	2
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STATUTES CITED

20 U.S.C. § 1401 - 20 § U.S.C. 1415	1, 2, 9, 11
Neb. Rev. Stat. § 43-625 & 43-626 (Reissue 1978)	2
42 U.S.C. § 6000 et seq.	7

REGULATIONS CITED

45 C.F.R. 121a.194	2
45 C.F.R. 121a.220	2
45 C.F.R. 121a.302 and Comment	2
45 C.F.R. 121a.320	2
45 C.F.R. 121a.513	2
45 C.F.R. 121a.551	2

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**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA**

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To The Honorable, The Chief Justice And The
Associate Justices Of The Supreme Court
Of The United States

The petitioners herein pray that a Writ of Certiorari
issue to review the judgment of the Supreme Court of
the State of Nebraska entered in the above entitled ac-
tion on May 13, 1983.

OPINIONS

Adams Central School Dist. v. Deist, 214 Neb. 307, ____ N.W.2d ____ (1983).

For the Complete text of opinion, see Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Nebraska was entered on May 13, 1983. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 2101 and United States Supreme Court Rule 17.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, REGULATIONS AND ORDINANCES

Constitution of the United States, Eleventh Amendment.

45 C.F.R. §§ 121a.194, .220, .302, .320, .513 and .551.

Nebraska Revised Statutes §§ 43-625 and 43-626 (Reissue 1978).

20 U.S.C. § 1414.

For complete texts, see Appendix B.

STATEMENT OF THE CASE

This case commenced as an administrative hearing brought by the parents of a multi-handicapped child for purposes of modifying an individualized educational plan (IEP) for the child. The child had been placed pursuant to an IEP in the fall of 1977 with Educational Service Unit No. 9 (hereafter referred to as

the ESU), which provided services to him pursuant to a contract with his resident school district, Adams Central School District No. 090. During December 1977, the child became violent and repeatedly struck the teacher and other students in the class. Several days before Christmas vacation his violence necessitated his removal from the specialized school. His parents were consulted within the day following his removal in a quest for another setting which was more restrictive but still appropriate for the student. This quest was not successful before Christmas vacation began, and when during the course of Christmas vacation the child became destructive of his parents' home, they placed him in a state operated mental institution known as the Hastings Regional Center. With the reconvening of school after the Christmas vacation, diagnostic teams reviewed the circumstances of the Deist boy, and the ESU, pursuant to the terms of its contract, began providing "homebound" services for the boy to the maximum the ESU believed possible taking into consideration that he was under a course of heavy drug therapy.

After a period of approximately 16 months spent by the Deist boy at the Regional Center, because the Nebraska Department of Education would not approve any residential placement outside of the State of Nebraska and because no state institution within the State of Nebraska could be found for placement, the parents, without notice to the resident school district or the ESU, removed the child from the Hastings Regional Center and placed him in a short-term psychiatric care facility known as the Nebraska Psychiatric Institute (NPI). While he was at NPI, his parents commenced a due process action seeking an IEP with a residential placement which they believed to be

required for their son. After a hearing, the hearing officer entered an order awarding the parents, among other things, 16 months of compensatory education and the right to placement in a residential care facility within the school district, although none existed at the time of the entry of his order. The hearing officer further ordered the school district to pay all of the expenses for the period when the Deist boy was at HRC and NPI. The school district had been paying under a contract with NPI approximately \$900.00 per month for educational services for the Deist boy, but the hearing officer's order directed the school district to pay the difference between that sum and the approximately \$4,000.00 per month cost for the care for the child at NPI.

An appeal was taken from the hearing officer's order by the school district and the ESU to the District Court of Adams County, Nebraska, under an appeal procedure which provides for an appeal *de novo* on the record. The District Court had the issues presented to it by the Amended Petition For Review of the school district and the ESU, a copy of which is incorporated herein as Appendix C. The District Court entered an order reversing the hearing officer's final decision and order in all respects, except that the District Court ordered the school district and the ESU to provide services should the Deist boy return to his resident school district in Hastings, Nebraska, and further ordered the parents to notify either the ESU or the school district of their intentions to return their son within forty days of the entry of the Court's order.

Thereafter, the parents took their appeal from the District Court order to the Supreme Court of Nebraska. As appellees, the petitioners herein raised in their

fourth argument the proposition that the Education Of All Handicapped Children Act "does not imply that costs (for services for handicapped children) be borne by a local school district, nor does it imply any private cause of action for damages." Appellees' brief in Case No. 81-773 in the Supreme Court of Nebraska, page 20. Thereafter, the Supreme Court of Nebraska held in its opinion, found herein as Appendix A, that the school district was obligated to pay for two placements, the one at HRC and the one at NPI, notwithstanding that neither the school district nor the ESU was notified of the parents' move of their child to those institutions. The Supreme Court of Nebraska held that the child was not entitled to compensatory education, but it did allow as damages the costs of the placements made by the parents contrary to the IEP, which had been signed by the student's mother back in 1977. A timely Motion For Rehearing and a Brief In Support thereof were filed in the Supreme Court of Nebraska by petitioners herein, assigning as errors:

10. The Court erred in finding that a private right for a cause of action in money damages exists in the parents of a special education child under the Education Of All Handicapped Children Act.

11. The Court erred in not recognizing that "compensatory education" and money damages are identical elements of damages within the context of the Education Of All Handicapped Children Act.

The State of Nebraska, the School District of Omaha and the Nebraska Association of School Boards were granted leave to file a Brief of *amicus curiae* in support of appellees' Motion For Rehearing essentially asserting, among other matters, that "monetary recov-

eries to reimburse parents for self-help actions to protect their handicapped children, if any there be, are not available under federal law in the circumstances of this case". *Amicus curiae* brief, page 18.

The Motion For Rehearing has not been ruled upon by the Supreme Court of Nebraska.

ARGUMENT

Monetary damages are not authorized under the Education Of All Handicapped Children Act.

The case of *Adams Central School District No. 90 v. Deist*, 214 Neb. 307, ____ N.W.2d ____ (1983), is a case of first impression in the state courts of Nebraska. The issue whether money damages are authorized by the Education Of All Handicapped Children Act, however, has previously been addressed by the Eighth Circuit Court of Appeals in a Nebraska case.

In *Monahan v. State of Nebraska*, 687 F.2d 1164 (8th Cir. 1982), Monahan had removed his son from the Omaha Public Schools and placed him in a program for handicapped children of his own choosing. One of the issues litigated was the entitlement of the father of the handicapped student to reimbursement for his expenditures. In *Monahan*, as in the *Deist* case, the student in question was placed in the program chosen by one of his parents before the invocation of the impartial hearing process provided by state law. The Eighth Circuit in *Monahan* refused to grant any reimbursement to Monahan and stated: "The District Court, citing *Stemple v. Board of Education*, 623 F.2d 893, 897 (4th Cir. 1980), held that damages are not re-

coverable for the costs of tuition at a school voluntarily selected by the parents. We cited *Stemple* approvingly in our first opinion in this case, 645 F.2d at 598, and we have now held, in any event, that there is no private right of action for damages under EEAHCA, except perhaps in exceptional circumstances not present here. *Miener v. Missouri*, 673 F.2d 969, 979-80 (8th Cir. 1982)." *Id.* at 1169.

The Eighth Circuit in *Monahan* went on to assess this Court's decision in *Board of Education v. Rowley*, ____ U.S. ____, 102 S. Ct. 3034, 73 L. Ed. 2d (1982), wherein this Court pointed out that the Education Of All Handicapped Children Act primarily is a procedural statute and does not impose a substantive duty to maximize each handicapped child's personal development. In *Rowley*, this Court stated that the "Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the states any greater substantive educational standard than is necessary to make such access to public education meaningful." *Id.* at 3043; and that the Act's intent was "more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside." *Id.* at 3043.

Rowley, in turn, has a counterpart case in *Pennhurst State School v. Halderman*, 451 U.S. 1, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). In *Pennhurst* a developmentally disabled person under the Developmentally Disabled Assistance and Bill Of Rights Act of 1975, 42 U.S.C. §§ 6000 *et seq.*, asserted the state had a duty to provide services in the "least restrictive treatment" possible. The Third Circuit in addressing this issue

imposed certain obligations on the state to provide at its own expense certain kinds of treatment on the basis that Congress intended in the Act to create enforceable rights and obligations. This Court overturned the Third Circuit decision and found that the explicit purpose of the Act was "to assist" the states through the use of federal grants in improving the care and treatment of the mentally retarded. This Court went on to state that "Congress was aware of the need of developmentally disabled persons and plainly understood the difference, financial and otherwise, between encouraging a specified type of treatment and mandating it." *Id.* at 7.

This Court also stated that the Act in question in *Pennhurst* was for the purpose of establishing "a national policy to provide better care and treatment to the retarded and to create funding incentives to induce the states to do so. But the Act does no more than that. We would be attributing far too much to Congress if we held that it required the States, at their own expense, to provide certain kinds of treatment." *Id.* at 31-32.

The applicability of *Pennhurst* to the instant case is apparent from this Court's reference to the fact that Congress in recent years has enacted civil laws designed to improve the way in which this nation treats the mentally retarded, enumerating at footnote 25 to that observation the Education For All Handicapped Children Act of 1975.

The significance of *Pennhurst* is that it places into proper perspective the law as it relates to the present case. A school district only is required to provide such services as are available and affordable, and

there is no requirement that the school district or its servicing agency go beyond that.

Another case on point from the Eighth Circuit is *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982). In that case the court was asked to address the question whether damages are available under the Education Of All Handicapped Children Act. In *Miener* the student, the victim of a brain tumor, suffered from serious learning disabilities and behavioral disorders. The student alleged that she was a voluntary resident at facilities of the Missouri Department of Mental Health for three years. She then was transferred to a private facility. She claimed that she was deprived of an appropriate free education during her three year stay in the state facilities in violation of the Education Of All Handicapped Children Act, 20 U.S.C. § 1401. She sought damages for deprivation of her constitutional right and her statutory right to a full and adequate education. The Eighth Circuit joined the Seventh Circuit [*Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981)] in holding that the Act does not authorize damages.

It appears from this Court's decision in *Pennhurst* and *Rowley*, that *Monahan* and *Miener* are correct. If federal funds to the states are to be properly and adequately used for the benefit of the intended beneficiaries of the funds, then those funds should not be depleted by persons who become displeased with a school district's adequacies, abilities and success in placements for handicapped children, make their own placements and send the school district the bills. To allow the *Deist* decision to stand in the face of *Monahan* and *Miener* will cause all school districts in Nebraska to have no definite body of law which they

can follow. The federal courts have said there is no obligation to reimburse parents who make placements of their own children; and there is nothing in either *Miener* or *Monahan* which indicates that, if after the fact of review, it is determined that the child was not in an adequate program (as one must of necessity assume the Supreme Court of Nebraska concluded), then the parents are entitled to reimbursement. To allow such a rendition of federal statutes to stand under state court application would cause and permit the State of Nebraska to impose a standard of strict liability, or at the very least a standard of extraordinary care, on school districts for all handicapped students. In other words, if after the fact and before any impartial hearing is convened on the matter, services are provided for a student which after a hearing are determined to have been inadequate, then the school district would have to pay for a placement unilaterally made by the parents. Such a rule in Nebraska by the Supreme Court of Nebraska indicates to parents of handicapped children that they may do as they please concerning the placement of their children and require the school districts to pay for those placements. Meanwhile, the federal courts governing the same state, the same department of education, the same school districts and the same parents, hold that it is clearly impermissible under both the federal statutes and the federal regulations to engage in such conduct.

Moreover, the decision in *Deist* vitiates the United States Supreme Court's application of *Pennhurst*, *supra*, wherein it is clear that the federal funds are forwarded to the states for purposes of precipitating innovation and to serve as a catalyst for progressive planning for the handicapped. Under the holding in *Deist*, the most expeditious position a school district could

take would be to assert it is unable to provide under the then circumstances for a particular student, and thereafter cease and desist from all efforts to make an appropriate placement for fear that, if it failed, it would receive the bill for the parents' effort. See 20 U.S.C. § 1414(d). A corollary of that position is that funds that can be expended on further efforts to provide a more adequate service for those who are severely handicapped will be depleted to pay for a form of alleged past educational malpractice. Such a result is neither contemplated, nor stated, nor fairly implied from the Education Of All Handicapped Children Act.

It is inconsistent to hold that the Education Of All Handicapped Children Act does not provide for an award of compensatory education, and at the same time award money damages, since they are identical forms of relief.

In *Miener, supra*, the plaintiffs sought money damages for the deprivation of a claimed right to "full and adequate education" and for compensatory relief in the form of additional education. The Eighth Circuit, however, held that neither of these forms of relief were authorized by the Education of All Handicapped Children Act. Rather, that the appropriate relief under the Act generally was intended to be restricted to injunctive relief, within which the district judge would have wide latitude to fashion an individualized educational program for the handicapped child. 673 F.2d at 979.

In reaching the above conclusions in *Miener*, the Eighth Circuit considered, but did not adopt, the

dictum of the Seventh Circuit in *Anderson, supra*, that some limited damage award might be appropriate if there was a risk to the handicapped child's physical health in the program offered by the school system, or when the educational authorities involved acted in bad faith by failing to comply with procedural provisions of the Act in an *egregious* fashion (emphasis supplied). In the instant case, however, such circumstances were neither alleged nor factually involved. Instead, it was the risk of the health of others that was of concern to the educational authorities, not the physical health of the child; and the educational authorities did not act in bad faith by failing to comply with the procedural provisions of the Act.

Moreover, it is inconsistent under the Act, applicable regulations and the case law of the Eighth Circuit to find that compensatory education was not available relief, as the Supreme Court of Nebraska did in the *Deist* case, but in the same breath hold that money damages may be recovered.

In *Miener* the appellants argued that compensatory educational services were prospective and equitable in nature, and were distinguishable from monetary damages. In response the Eighth Circuit stated:

Often, as is the case here, the line between prospective and retrospective relief may not be bright. * * * Appellant seeks such compensatory services from the state as are necessary "to overcome the effects of any wrongful denial of special educational services." The eleventh amendment bars such services if they are a form of retroactive compensation "measured in terms of a monetary loss resulting from a past breach of legal duty." * * * On the other hand, the eleventh

amendment is no bar if the relief appellant seeks can fairly be characterized as "a necessary consequence of compliance in the future with a substantive federal question determination." * * *

An award of tuition reimbursement would clearly be barred as an award of damages for past breach of legal duty under this test. * * * We view the request for compensatory services as practically indistinguishable from a request for such reimbursement. Compensatory services, like the award of a money judgment, would be measurable against past educational deprivation. The expenditure of state monies to provide compensatory services would not, in other words, ensure "*compliance in the future* with a substantive federal question determination." *Edelman v. Jordan, supra*, 415 U.S. at 668, 94 S. Ct. at 1358 (emphasis added). We conclude that the eleventh amendment bars the award of such compensatory relief as appellant has requested.

While *Miener* was weighing the right to compensatory services as against the State of Missouri, the crucial fact is that both the logic and the case law of the Eighth Circuit dictate that there is no distinction between monetary reimbursement and compensatory educational services. It therefore was inconsistent for the Supreme Court of Nebraska in *Deist* to conclude that federal law does not allow compensatory education, and at the same time hold it does authorize the payment of money damages to the parent of a handicapped student.

In order that it might be determined whether the Supreme Court of Nebraska has correctly construed the Education of all Handicapped Children Act, or whether

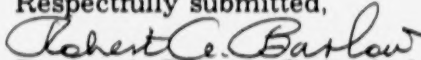
the Eighth Circuit has, a decision of this Court is necessary to clarify whether compensatory education and tuition reimbursement are really the same forms of relief.

It is asserted by the petitioners herein that they are and that the Supreme Court of Nebraska erred in not so finding.

CONCLUSION

It is respectfully requested that the Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska be granted because such state court of last resort has construed the federal Education of All Handicapped Children Act in a way in conflict with decisions of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,



ROBERT A. BARLOW, Counsel of Record,
and

JOHN F. RECKNOR
of

BARLOW, JOHNSON, DEMARS & FLODMAN

P.O. Box 81686

Lincoln, Nebraska 68501

(402) 475-4240

Attorneys for Petitioners

Adams Central School District No. 090,

Adams County, Nebraska,

and Educational Service Unit No. 9

APPENDIX A

ADAMS CENTRAL SCHOOL DIST. V. DEIST

214 Neb. 307, ____ N.W.2d ____ (1983)

No. 81-773 — filed May 13, 1983.

1. **Schools and School Districts: Special Education: Appeal and Error.** The courts, in reviewing special education appeal proceedings under Neb. Rev. Stat. §§ 43-661 et seq. (Reissue 1978), are not to make independent findings of their own but must follow the criteria set forth in Neb. Rev. Stat. § 84-917 (Reissue 1981) and determine if the action was supported by substantial and competent evidence and was neither arbitrary nor capricious.

2. **Schools and School Districts: Special Education.** A state which accepts financial assistance from the federal government under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), is obligated to provide all handicapped children with a free appropriate public education.

3. ____: _____. A free appropriate public education requires that each handicapped child be given the opportunity to achieve such child's full potential commensurate with the opportunity provided to other children.

4. ____: _____. When a handicapped child is sent home from a school setting and is not allowed to return, such child has been expelled from the school.

5. ____: _____. The expulsion of a handicapped child from school constitutes a change in placement, and when that occurs the procedural protections of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 to 1415 (1976), are to be followed.

6. ____: _____. Local school officials are prohibited, under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), from expelling students whose handicaps cause them to be

disruptive; in such a case a school may only transfer the disruptive student to an appropriate, more restrictive environment.

7. ____: _____. The burden rests with the local school officials to produce evidence as to whether or not the student involved was expelled for behavior due to such child's handicap.

8. ____: _____. A school district, responsible for providing a "free appropriate public education" to a handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services.

9. ____: _____. The state is not obligated under either the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976) or the state care and education of handicapped children legislation, Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978), to provide a free appropriate public education beyond the child's 21st birthday.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

HASTINGS, J.

This action began as a special education hearing brought pursuant to 20 U.S.C. § 1415 (1976) and Neb. Rev. Stat. § 43-661 (Reissue 1978) before the Nebraska Department of Education. Marvin and Myrtle Deist brought this action on behalf of their son David against Adams Central School District No. 000 (Adams Central), Educational Service Unit No. 9 (ESU No. 9), and the Nebraska Department of Education (NDE), alleging that David had been denied a free appropriate public education. The NDE was dismissed as a party at the administrative level.

After a hearing was held, the hearing officer, Michael Sullivan, found that David had been denied a free appropriate public education. Sullivan ordered the appellees to provide David with a residential placement near his home, to pay for David's past placement in the Hastings Regional Center and the Nebraska Psychiatric Institute, and granted David 16 additional months of free appropriate public education as compensation for education he failed to receive in the past.

Adams Central and others appealed the hearing officer's decision to the District Court of Adams County, Nebraska, which reversed the decision of the hearing officer. That court found David to be entitled to classroom placement without any residential care other than by his parents; that Adams Central is not liable for the costs of David's placement in the Hastings Regional Center or the Nebraska Psychiatric Institute, as such placement was voluntary and without the consent of Adams Central; and that David is not entitled to 16 months' additional free appropriate public education as compensation for education missed in the past.

The Deists have appealed, assigning several errors in the decision of the District Court. They complain that the District Court erred (1) in holding that a day educational program could provide David with free appropriate public education; (2) by failing to hold that David was unlawfully excluded from public school; (3) by not ordering residential placement for David; (4) by failing to assign primary responsibility for David's education to appellees; (5) in holding that David was voluntarily placed in the Hastings Regional Center and the Nebraska Psychiatric Institute; (6) by denying appellants reimbursement for the cost of that place-

ment; and (7) in denying David any compensatory education.

There is no real dispute as to the facts in this case. David Deist was born July 25, 1963. His early development was fairly normal. In 1966, after David began to exhibit some antisocial behavior, the Deists had him examined by Dr. Frank Menolascino of the Meyer Children's Rehabilitation Institute in Omaha and by Dr. Michael O'Neill of the Norfolk Regional Center. At that time both of these doctors described David as autistic. Twice a week during the next 2 years David received services from the Norfolk Regional Center. When he reached the age of 6 the Deists moved to Hastings, and there David began attending school at the School for the Trainable Mentally Retarded (TMR School) and the Hastings Regional Center, one-half day each. Eventually David attended a full-day program at the TMR School. When he was 12, in approximately 1976, he developed grand mal epilepsy. The general consensus of the experts who have examined David is that he suffers from autism or organic brain syndrome, mental retardation, and epilepsy.

In the fall of 1977 David began exhibiting increasingly destructive and disruptive behavior at school and at home. As a result of this behavior he became increasingly difficult to handle at school. On approximately December 21, 1977, David was sent home from school early. Mrs. Deist testified that a note was sent home with David stating, in short, that he could not return to school until his behavior was altered.

On December 22, 1977, the Deists met with the local school officials to discuss David's placement. Mrs. Deist testified that it was her understanding from this

meeting that David would not be permitted to return to the TMR School and that there was no available suitable placement for David at that time. This was confirmed by the testimony of Don Sutton, supervisor of special education of the trainable mentally handicapped, who said that he was not surprised when David did not come back to school in December because "I think we had requested that they keep him home." He also confirmed that at the meeting with the parents they were told that David was going to have to stay home because he was just unmanageable. On December 28, 1977, unable to care for him at home, the Deists placed David in the Hastings Regional Center.

As early as January 4, 1978, Thom Pickton, a social-emotional consultant at ESU No. 9, who had worked with David, recommended: "The most appropriate or ideal placement for David at this time would be a completely structured 24-hour setting incorporating the use of applied behavioral techniques such as premaking, time-out, contingency management, etc." Pickton also observed that David's aggressive behavior had increased after an increase in his seizure medication had been prescribed. Similar recommendations calling for a 24-hour-per-day structured program for David were also made by other ESU No. 9 staff members in the first few months of 1978, and Mr. Sutton agreed that ESU No. 9 undertook no actions on the basis of those recommendations. He also conceded that at the January 23 meeting he did have objections to David's returning to the TMR School because he did not think he was ready. No homebound instruction was given to David during the month of January because he could not find any teacher to work with him. After January 30 Mr. Sutton said that he found a

friend of his to work with David, a person who at the time was working for a bakery, who was not a certified teacher of any sort but did have a degree in business. Therefore, while at the regional center David received, at best, 2 hours of educational instruction per day.

While in the regional center David deteriorated greatly, losing many of the skills he had mastered prior to his being placed there. Members of the ESU No. 9 staff, Adams Central staff, and the Deists met monthly during David's stay at the regional center to discuss his placement. No alternative placement for David was made, even though it was agreed that the regional center was not the appropriate place for David. Finally, the regional center staff, in May of 1979, informed the Deists that their only option was to move David to the state institution in Beatrice and that this would have to be done by May 10, 1979.

David's parents visited the facilities at Beatrice in April, and Mrs. Deist testified that the children's cottage facilities were nice, modern, and up-to-date, and they seemed to have an adequate staff working with the various group homes. However, when asking about arrangements to place David, they were told that there was a long waiting list, over a year's time. The only thing available, they were told, was a locked male ward. The parents concluded that this was not a satisfactory placement for their son.

According to the evidence, the Deists were told that David could not remain at the Hastings Regional Center after May 10. At that time the Deists moved David to the Nebraska Psychiatric Institute (NPI) in Omaha. This was done as a result of joint efforts and

with the support of ESU No. 9 and Adams Central, although it was the Deists who located this placement and transferred David thereto. David remained in the NPI until the time of hearing, March 10, 1980. There is no evidence in the record indicating what has happened to David since that time.

There are several substantive issues presented on this appeal. First, we must determine the appropriate standard of review in this matter. Neb. Rev. Stat. § 43-666 (Cum. Supp. 1982) provides for appeals from the decision of the hearing officer in cases such as this. It states: "Any party aggrieved by the findings, conclusions, or final decision and order of the hearing officer is entitled to judicial review under sections 84-917 to 84-919. Orders of hearing officers are enforceable in appropriate proceedings in the courts of this state."

Neb. Rev. Stat. § 84-917 (Reissue 1981) provides for review of the hearing officer's decision by the District Court. Subsections 5 and 6 of that statute provide how that decision may be reviewed: "(5) The review shall be conducted by the court without a jury on the record of the agency.

"(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

"(a) In violation of constitutional provisions;

"(b) In excess of the statutory authority or jurisdiction of the agency;

“(c) Made upon unlawful procedure;

“(d) Affected by other error of law;

“(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

“(f) Arbitrary or capricious.”

Neb. Rev. Stat. § 84-918 (Reissue 1981) describes this review as “de novo on the record.”

When interpreting these statutes we have held that only a limited review of the findings of the agency is provided for. In *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973), we had an opportunity to determine the meaning of “de novo” review under these statutes: “The plaintiff contends that the provisions of section 84-918, R.R.S. 1943, providing for de novo review in this court, mean that we examine the record and reach an independent conclusion without reference to the findings of the commission or those of the District Court. The commission contends that our review of its decision is governed by the criteria of section 84-917(6), R.R.S. 1943, as is the review by the District Court.

“The statute does not make clear which meaning is intended. We believe the commission’s contention is essentially correct. If, for example, under criteria (6)(e) there is before the commission substantial evidence which would support a finding either way, neither the District Court nor this court should disturb the commission’s finding. In such a case and where fact findings under criteria (6)(e) are involved, we review

the decision of the District Court only to determine that it and the commission have applied the proper criteria, and it is in this sense that we review de novo." 190 Neb. at 764-65, 212 N.W.2d at 346-47.

Under these statutes the courts are only to give limited review to determine if the agency's decision was supported by competent evidence, if it was arbitrary or capricious, etc. The reviewing court may not make independent findings of its own. This being the applicable standard of review in this matter, we need only determine if the hearing officer applied the proper rules of law in this case to reach a decision which is supported by competent evidence in the record.

The laws governing the educational rights of the handicapped are found in both federal and state law. The Education for All Handicapped Children Act of 1975 (the Act), 20 U.S.C. §§ 1401 et seq. (1976), represents the federal body of law, and the care and education of handicapped children is provided for in Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978) on the state level. The Act is a funding statute under which the federal government supplies financial assistance to the states for the education of handicapped children. By accepting these funds the state implicitly agrees to meet certain criteria and requirements. See *Monahan v. State of Neb.*, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part and rev'd in part* 645 F.2d 592 (8th Cir. 1981). In short, the Act requires each state that accepts these funds to provide all handicapped children with a free appropriate public education.

"The Act provides for funds to be distributed to the states electing to participate under its provisions. In making the election a state has to satisfy the Commis-

sioner of Education that it 'has in effect a policy that assures all handicapped children the right to a free appropriate public education.' 20 U.S.C. § 1412." *Hines v. Pitt County Bd. of Ed.*, 497 F. Supp. 403, 405 (E.D. N.C. 1980). It is interesting to note that the court in *Hines* points out in a footnote that all states have elected to accept these federal funds except New Mexico.

Defining what a free appropriate public education is, § 1401(18) states: "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

The specific requirements in each given case, when determining what is appropriate, will, of course, depend upon the needs and abilities of each individual involved. " 'This standard would require that each handicapped child be given the opportunity to achieve his full potential commensurate with the opportunity provided to other children.' " *Springdale School Dist. #50 v. Grace*, 656 F.2d 300, 304 (8th Cir. 1981).

In this case the record contains a great deal of evidence concerning what is the appropriate educational setting for David. As pointed out above, Thom Pickton and other ESU No. 9 staff members recommended a 24-hour structured environment for David when he first left the Adams Central schools. Dr. John

McGee testified that he worked with David while at the NPI. Dr. McGee is the special assistant to the director of the Meyer Children's Rehabilitation Institute and project director for the Nebraska Chapter for the Society of Autism in the development of programs for autistic children and adults, and has had 12 years' experience in teaching and working with handicapped children and adults. When asked what type of educational program David would most benefit from, Dr. McGee said: "A. . . From my working with David and observing other people like David around the country and other programs around the country, my recommendation would be that David needs a total educational program. In other words, from the time he gets up in the morning until the time he goes to bed in the evening, during that thousand minute waking day David should be in a developmental educational structured, intensive kind of program. The way functionally or practically I would see that working would be, number one, he should be in a highly structured classroom setting with a well trained teacher, and we've some teachers who through minimal intensive practical training pick up the skills that a person with his needs requires. So, he would be in that kind of classroom setting working on, I think, a mix of cognitive skills, academic skills, prevocational skills, self-care types of skills. And then, in conjunction with that, a concurrent educational program in an out-of-home community based, residentialal [sic] facility that would work in conjunction with the classroom setting which David was in and would reinforce a lot of the things that he was involved in, so that you would end up with a total educational program. David does need structure, there's no doubt about it. David needs a type of setting where he can be involved in learning all day long. And I think if we were to do that, that

across time that degree of structure he needs would decrease but at the onset we need that type of flexibility built into his program. Q- And I guess it's my understanding from what you have been saying is that the residential component of the program is an integral part of the whole educational program for David. A- No doubt about it."

When asked if this type of environment could be provided in the home, Dr. McGee said he felt a home situation could not offer a sufficiently controlled environment to facilitate David's needs. Testimony was also taken from a Dr. Michael O'Neill. He is a certified general and clinical psychologist and is an adviser to the Nebraska Society for Autistic Children. Dr. O'Neill had worked with David at the Norfolk Regional Center. When asked his opinion as to whether a residential component would be an integral part of a structured education for David, he said: "A- I think that a residential program would be essential to his education at this point. Q- Can you explain the reason for that feeling? A- The kinds of learning that David needs will be very difficult to accomplish in simply a classroom setting. While it may be possible to achieve some control over his behavior and his skill level within the classroom, within the confines of the classroom, experience and research with autistic children has shown a considerable difficulty they have in generalizing to the rest of their world experience. They seem to be able to discriminate areas that they need to behave and learn and areas that it's unnecessary for them. If David is to establish any of the skills and competencies set out in the I.E.P. as a part of his general level of functioning, that will have to be on a twenty-four hour a day basis."

Finally, the testimony of Dr. Frank Menolascino was taken in deposition form. He is associate director of the Nebraska Psychiatric Institute and has been associated therewith for 20 years. He worked a great deal with David while at the NPI. Dr. Menolascino's opinion is in accord with Dr. McGee's and Dr. O'Neill's as to what David's needs are, that is, a residential, group-home type setting. The evidence recommending David be given this type of educational setting is uncontradicted by any other evidence in the record.

On the basis of this evidence the hearing officer Sullivan found "residential placement in or near this community [Hastings, Nebraska] is a necessary element of free and appropriate public education to which David Deist is entitled to under the law." This finding is permissible under the law.

"It is clear that the Act contemplates residential placement under some circumstances, and that when a residential placement is necessary for educational purposes, 'the program, including non-medical care and room and board, must be at no cost to the parents of the child.' 45 C.F.R. § 121a.302." *Kruelle v. Biggs*, 489 F. Supp. 169, 173 (D. Del. 1980). See, also, *Gladys J. v. Pearland Independent School Dist.*, 520 F. Supp. 75 (S. D. Tex. 1981). This finding is supported by the substantial evidence set out above that was before the hearing officer.

As pointed out above, review by this court and the District Court in this case is limited. We are only to determine if the hearing officer's decision is supported by the evidence, is proper under the applicable law, and if it is arbitrary or capricious. We determine, on

a review of the entire record, that the decision of the hearing officer granting residential placement to David Deist is permissible under the law, is supported by substantial and competent evidence, and is neither arbitrary nor capricious. Therefore, we find that portion of the hearing officer's order which granted David residential placement was proper, and it is reinstated.

We turn now to the question of whether the Deists should be reimbursed for the costs they incurred while David was in the Hastings Regional Center and the NPI. To answer this question we must first determine if David's removal from the Adams Central schools was voluntary, a suspension, or an expulsion.

As pointed out above, Mrs. Deist testified that on the day David was sent home in December of 1977 she had a note indicating the school would not allow him to return. She also testified that after the meeting of December 22, 1977, with the school officials it was her impression that David could not return to school. Mr. Don Sutton, supervisor of the school David attended, testified that he shared the belief that David could not return to school. Mr. Sutton also testified as to a meeting held on January 23, 1978. He said that at that time he felt David could not return to school. On February 16, 1978, another meeting was held to consider alternatives for David. At that time return to the TMR School was not considered as a possible alternative. Meetings like these continued throughout 1978, at which alternatives for David's education were discussed. His return to the TMR School was never offered as an alternative. This evidence clearly supports the hearing officer's finding that David was expelled from the TMR School.

When a handicapped child is expelled, this constitutes a change in placement. When a change in placement occurs, the procedural protections of the federal act, §§ 1401 to 1415, are to be followed. *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). These procedures were not followed in this case.

Also, local school officials are prohibited, under the federal act, from expelling students whose handicaps cause them to be disruptive. In such a case the school may only transfer the disruptive pupil to an appropriate, more restrictive environment. *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978). In this case there is no evidence which definitely states what caused David's disruptive behavior, although there is some indication that it may have been due to the increase in the medication he was taking. The lack of such evidence does not give rise to an inference that expulsion was appropriate. Rather, the burden is on the state to produce evidence as to whether the student involved was expelled for behavior due to his handicap or not. *S-1 v. Turlington, supra*.

In light of the above authority David was not only expelled but he was expelled improperly. The question now becomes what relief, if any, may be afforded the Deists in light of this improper expulsion. The case of *Boxall v. Sequoia U. High Sch. Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979), gives some guidance. In that case Frank Boxall tried to obtain an educational placement with the local school district for his autistic son. The district informed Boxall that no program was available for his son, and denied him any placement. For 2 years after this denial Boxall paid a private tutor to work with his son. Finally, Boxall

brought an action under, among other federal statutes, the Education for All Handicapped Children Act of 1975 and the Rehabilitation Act of 1973, as did the Deists in this case. Boxall sought to secure a free appropriate public education for his son and to recover the cost of the private tutor.

Discussing whether this cost was recoverable or not, the court said: "First, the Education of the Handicapped Act again provides its own complementary remedies. As noted before, it expressly contemplates a private right of action to review the decision on what constitutes an appropriate education for a handicapped person. It is not completely clear from the wording of the statute whether it implies an action for damages. Section 615(e)(2) of the Act, 20 U.S.C. § 1415(e)(2) simply gives aggrieved individuals the right to bring a civil action. *See also* 45 C.F.R. § 121a.511. Some light is shed, however, by the available legislative history of this right to review, which was adopted initially by the Conference Committee. It was not originally part of the Senate bill, and the House provision was also somewhat different. The Committee Report indicates that no limitation on damages actions was intended. It states that: 'Such action may be brought in any State court of competent jurisdiction or in any district court of the United States and in any such action the court shall receive the records of the due process hearing (and where appropriate the records of the review of such hearings), shall hear additional evidence at the request of any party, shall make an independent decision based on the preponderance of the evidence, and *shall grant all appropriate relief.* [Emphasis added.]' Joint Explanatory Statement of the Committee of Conference, in Senate Conference Report No. 94-455, p. 50,

reprinted in [1975] U.S. Code Cong. and Admin. News, pp. 1425, 1503. This statement suggests very strongly that, when appropriate, compensatory damages may be awarded. Since this action is under the Education of the Handicapped Act as well as the Rehabilitation Act, the court does have the authority to award damages." *Id.* at 1112.

Viewing the legislative history of the federal act and the *Boxall* decision, it seems that compensatory relief may be appropriately granted under the Act. Such a position is in keeping with Nebraska law. See Neb. Rev. Stat. § 43-662.01 (Cum. Supp. 1982), which states that "the hearing officer shall prepare a final decision and order directing such action as may be necessary."

To determine when compensatory relief may be granted, the decision in *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), is helpful. *Doe* presented a case where a handicapped child was expelled from school. The expulsion was appealed. One of the issues raised was whether or not the child or his parents could recover damages. That court concluded that this issue need not be reached at that time, but added in dicta that possible recovery depended upon the answer to three questions: "Whether the plaintiff is entitled to compensation depends on whether the school has caused him to lose any education. Whether the school has caused the plaintiff to lose any education depends on whether he would have been expelled even if the appropriate procedures had been followed. And whether he would have been expelled even if the appropriate procedures had been followed depends on whether his propensity to disrupt was the result of his inappropriate placement." *Id.* at 229.

In the present case the hearing officer found the school did cause David to lose education; that he would not have been expelled if the appropriate procedures had been followed; and that his propensity to disrupt was due to his placement. There is evidence in the record to support these findings. As pointed out above, David was improperly expelled from the TMR School, as the appropriate procedures under the Act were not followed. No alternative placement was offered by the school district. This deprived David of education.

All the evidence at the hearing relevant to what placement David needs states that he needs a structural residential placement, not what he received at the TMR School. Dr. Menolascino testified that David made great strides while at the NPI in reducing or eliminating the disruptive behavior. From this the hearing officer could find that David's propensity to disrupt was the result of his inappropriate placement. If the proper procedures had been followed this inappropriate placement would have been discovered. Under the idea of "appropriate education" the answer then would have been to offer David a different placement rather than simply expel him from school.

From this evidence the hearing officer could find that the three elements from *Doe* are present in this case. Since there would be evidence present from which the hearing officer could find the test from *Doe* had been met in David's case, it would be proper for him to find that the Deists are entitled to compensation for moneys expended for David's placement.

The appellees in their brief cite the case of *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979) in support of the proposition that damages are not permissible

under the Education for All Handicapped Children Act of 1975. That case was, in part, an action in tort alleging negligence on the part of the individual school board members because a child's learning disabilities were not properly diagnosed, and, as a result, that negligence has made it virtually impossible for the student to function at his full intellectual capacity. In rejecting that contention the court said: "The thrust of federal legislation in the field of special education has been to provide financial assistance to the states, in their effort to provide each one of their handicapped children with an appropriate education. Recognition of a private remedy for damages, as alleged in this instance, would compel these programs to shift their focus. Insulation of school officials from liability would take precedence over the implementation of innovative educational reforms. Recognition of the plaintiff's claim would cause special education programs to suffer, since administrators would balk at implementing new curricula and techniques for fear of exposing themselves to liability should these innovations fail." *Id.* at 115. The case which we have under consideration does not involve innovative action, it involves inaction, and is one for reimbursement, not for general damages.

Also cited by appellees is the case of *Jaworski v. Rhode Island Bd. of Regents for Ed.*, 530 F. Supp. 60 (D. R.I. 1981), which did in fact seek reimbursement for the parents because of a failure to provide a proper placement of a handicapped child. The court relied on *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), in concluding that "the better view is that money damages are *not generally available* under the EAHCA." (Emphasis supplied.) *Id.* at 64.

Anderson did say that. However, the following quotation from *Anderson* is particularly applicable to the instant case: "Although we hold that the statute was not intended generally to provide a damage remedy for an incorrect placement decision, we can envision at least two exceptional circumstances in which a limited damage award might be appropriate. In those situations it is likely that Congress, though generally requiring that a child remain in his current placement, 20 U.S.C. § 615(e)(3), would have intended that parents take action to provide the necessary services for their children without awaiting the outcome of lengthy administrative and judicial proceedings. Parents should then be compensated for the costs of obtaining those services that the school district was required to provide.

"The first such circumstance was addressed in *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981). There a child's physical health would have been endangered had the parents not made alternative arrangements to those offered by the school system. . . . In our view, when a court subsequently determines that the services in dispute were necessary to protect the physical health of the child and also were services that should have been provided by the school district, the district court has the statutory authority to recompense parents for the costs of those services the school district failed to provide." *Id.* at 1213-14.

Although criticized by the *Jaworski* court, nevertheless *Monahan v. State of Neb.*, 491 F. Supp. 1074 (D. Neb. 1980), contained this language: "The Education of All Handicapped Children Act specifically creates a private cause of action which may be brought in federal court. In resolving such lawsuits, the Court is

empowered by the Act to 'grant such relief as the court determines is appropriate.' 20 U.S.C. § 1415(e)(2). This language indicates that the Court has broad authority in granting relief under the Act. This conclusion is reinforced by the Act's legislative history, which states that 'the court . . . shall grant *all* appropriate relief.' *Joint Explanatory Statement of the Committee of Conference*, S. Rep. No. 94-455, 94th Cong., 1st Sess., at 50, *reprinted in* U.S. Code Cong. and Admin. News, at p. 1503 (1975). This language in the Act and its legislative history strongly suggest that the Court may award damages under the Act when such relief is deemed to be appropriate. *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104, 1112 (N.D. Cal. 1979). Moreover, recovery of the cost of tuition in the instant case would further the Act's purpose. This expenditure for tuition was allegedly made because of the defendant's failure to comply with the Act's procedural requirements. If these claims are proved, recovery of this cost will further the Act's purpose of ensuring that all handicapped children receive a free appropriate education. In other words, the defendants would be required to pay the costs of Daniel's education and thus provide Daniel with a free education as the Act requires. *Compare Loughran v. Flanders, supra*, 470 F. Supp. at 115 (which held that a plaintiff could not recover damages for emotional injury or future lost earnings because such recovery would hinder fulfillment of the Act's purpose.) Thus, this Court finds that if Monahan proves his claim under the Act, an award of damages may be appropriate to compensate him for the cost of the George Norris placement." *Id.* at 1094.

We conclude that a school district, responsible for providing a "free appropriate public education" to a

handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services.

We therefore reverse the order of the District Court and reinstate that of the hearing officer regarding the reimbursement to the Deists of their cost incurred in placing David in the NPI and the Hastings Regional Center.

Turning to the issue of compensatory education, we find no support for the findings of the hearing officer in the relevant law. The Act, by its clear and unambiguous language, limits eligibility to children ages 3 to 21. § 1412(2)(B). There is no authority under this statutory scheme by which the hearing officer could grant free appropriate public educational benefits to David beyond his 21st birthday. As such, this grant was an abuse of the hearing officer's discretion. That portion of the District Court's opinion which overrules the grant of compensatory education by the hearing officer is affirmed.

AFFIRMED IN PART, AND
IN PART REVERSED.

APPENDIX B

Constitution of the United States, Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

45 C.F.R.

§ 121a.194 Withholding.

(a) If a State Educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under § 300.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in § 300.592.

(20 U.S.C. 1414(b)(2))

§ 121a.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

§ 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(b); 1413(a)(4)(B))

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

Priorities in the Use of Part B Funds

§ 121a.320 Definitions of "first priority children" and "second priority children."

For the purposes of §§ 121a.321-121a.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under § 121a.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

§ 121a.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

§ 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under § 121a.13 of Subpart A (Instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services

(such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

Nebraska Revised Statutes (Reissue 1978)

43.625. State Board of Education; review special training and educational programs; qualified teacher, defined. The State Board of Education shall review special training and educational programs offered by or in conjunction with any public school district, combination of public school districts, educational service unit, or combination of educational service units subject to the following:

- (1) The teacher or teachers in any such special program shall be qualified;
- (2) Teacher aides, working with any such program, shall have such qualifications as the governing body of the school shall prescribe and shall participate in appropriate in-service activities; and
- (3) Each qualified teacher shall be responsible for the direct supervision of teacher aides, whose duties shall be limited to those prescribed in section 79-1233.

As used in this section, qualified teacher shall mean an individual holding a valid State of Nebraska teaching or special services certificate with an endorsement appropriate to the handicaps served. If such teacher is serving children with more than one handicap, qualified teacher shall mean an individual holding a valid State of Nebraska teaching or special services certificate with an endorsement in at least one of the handicaps served.

Source: Laws 1967, c. 246, § 1, p. 650; Laws 1972, LB 690, § 12; Laws 1973, LB 403, § 15; Laws 1974, LB 863, § 4; Laws 1976, LB 761, § 4.

43-626. Special education or treatment; residential care; cost. Whenever a child is forced to have temporarily the school district of which the child is a resident in order to attend an appropriate special education program and must reside in a residential facility, boarding home, or foster home for the duration of the special education program the State of Nebraska shall provide for the ordinary and reasonable cost of the residential care during the duration of the special education program. The state shall not be required to pay such cost unless placement of the child in a special education program requiring residential care was made by the resident school district with prior approval by the State Department of Education. The provisions of this section shall not apply to state-level treatment facilities operated by the Department of Public Institutions.

Source: Laws 1967, c. 243, § 1, p. 646; Laws 1972, LB 690, § 13; Laws 1973, LB 403, § 16; Laws 1978, LB 871, § 1.

20 U.S.C.

§ 1414. Application

Requisite features

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which—

(A) provide that all children residing within the

jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including—

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of section 1412(5) (B) of this title, the provision of special services to enable such children to participate in regular

educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs

carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5) (B), 1412(5)(C), and 1415 of this title.

**Approval by State educational agencies of
applications submitted by local educational agencies
or intermediate educational units;
notice and hearing**

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Commissioner under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

Consolidated applications

(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may

receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

**Special education and related services provided
directly by State educational agencies;
regional or State centers**

(d) Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with

other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

Reallocation of funds

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

Programs using State or local funds

(f) Notwithstanding the provisions of subsection (a) (2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

Pub.L. 91-230, Title VI, § 614, Apr. 13, 1970, 84 Stat. 181;
Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 784.

Historical Note

1975 Amendment. Pub.L., 94-142, effective Oct. 1, 1977, completely revised the section so as to incorporate within its provisions the process through which local educational agencies and intermediate educational units desiring to receive payments submit applications to the appropriate State educational agency and so as to eliminate former provisions covering State matching funds.

Effective Date of 1973 Amendment. Complete revision of this section by section 5(a) of Pub.L. 94-142 effective Oct. 1, 1977, see section 8(e) of Pub.L. 94-142, set out as an Effective Date of 1975 Amendment note under section 1411 of this title.

Legislative History. For legislative history and purpose of Pub.L. 91-230, see 1970 U.S.Code Cong. and Adm.News, p. 2768. See, also, Pub.L. 94-142, 1975 U.S. Code Cong. and Adm.News, p. 1425.

APPENDIX C

IN THE DISTRICT COURT OF ADAMS COUNTY,
NEBRASKA

ADAMS CENTRAL SCHOOL)	DOCKET 67
DISTRICT #090, Adams County,)	
Nebraska, and EDUCATIONAL)	PAGE 34
SERVICE UNIT #9,)	
)	
Petitioners,)	CASE NO. 20634
)	
V.)	
)	
MARVIN DEIST and MYRTLE)	AMENDED
DEIST, and the NEBRASKA)	PETITION
DEPARTMENT OF EDUCATION,)	FOR REVIEW
)	
Respondents.)	

COME NOW the petitioners, and each of them, and pursuant to § 43-666 R.R.S. 1943 and § 84-917 R.R.S. 1943, and for their Amended Petition for Review from the Final Decision and Order of the hearing officer in a case heard before the Nebraska Department of Education and designated as Case No. 79-08 in which Marvin Deist and Myrtle Deist were designated as petitioners, and the petitioners herein, and each of them, and the Nebraska Department of Education were named as respondents, and allege as follows:

1. That on or about the 2d day of July, 1979, respondents herein, Marvin and Myrtle Deist, filed their Petition with the Nebraska Department of Education.

2. That on or about the 5th day of July, 1979, Hearing Officer Mr. Michael E. Sullivan filed Notice to File

Answer to Adams Central School District #090, Adams County, Nebraska, Educational Service Unit #9, and the Nebraska Department of Education.

3. That on or about the 9th day of July, 1979, the Nebraska Department of Education filed its Special Appearance in the case.

4. That on or about the 16th day of July, 1979, your petitioners, and each of them herein, filed their Answer in the above said Case No. 79-08.

5. That on or about the 14th day of November, 1979, Marvin and Myrtle Deist filed their Amended Petition in the above said case.

6. That on or about the 19th day of February, 1980, petitioners herein, and each of them, filed their Answer to said Amended Petition.

7. That on or about the 7th day of March, 1980, the above said hearing officer sustained the Demurrer filed previously to March 7, 1980, wherein respondent Nebraska Department of Education was dismissed from the proceedings in the above said case.

8. That commencing on the 10th day of March, 1980, and through March 13, 1980, a hearing was held in the above said case.

9. That on or about the 22d day of September, 1980, the Hearing Officer issued his Final Decision and Order, which Final Decision and Order was received by your petitioners herein, and each of them, on or about the 23rd day of September, 1980.

10. That the said Final Decision and Order, a copy of which is attached hereto and incorporated by reference herein as if fully set forth and which is designated Exhibit "A" should be reversed or vacated for the reason that your petitioners, and each of them herein, have been prejudiced by said decision in one or more of the following manners:

- (a) The said Final Decision and Order is in violation of constitutional provisions, both as to the Constitution of the State of Nebraska and the United States Constitution;
- (b) The said Final Decision and Order is in excess of statutory authority and jurisdiction of said agency;
- (c) The said Final Decision and Order was made upon unlawful procedure;
- (d) The said Final Decision and Order is affected by error of law;
- (e) The said Final Decision and Order is unsupported by competent material and substantial evidence in view of the entire record as made on review;
- (f) The said Final Decision and Order is arbitrary and capricious;
- (g) The said Final Decision and Order is in excess of the statutory authority and jurisdiction of the Hearing Officer;
- (h) The Hearing Officer abused his discretion in excluding certain evidence at the said hearing in the above said matter;
- (i) The Hearing Officer abused his discretion based upon the evidence in making the said Final Decision and Order above referred to;
- (j) The said Final Decision and Order is con-

trary to federal law in that the ultimate responsibility for providing a program such as is sought in this case when the local educational agency is unable to do so falls upon the State Department of Education which was not a party to the adjudication made by the Final Decision and Order of the hearing officer as hereinabove said;

- (k) The said Final Decision and Order as hereinabove said is contrary to the rules and regulations of the Nebraska Department of Education which were in effect at the time said Final Decision and Order was made, which rules and regulations are binding upon both petitioners herein. The said Final Decision and Order is in violation of the constitutional provisions both as to the Constitution of the State of Nebraska and the United States Constitution in that it affords a free public education to David Deist beyond the age of 21 and is in that manner violative of equal protection for those other patrons of petitioners Adams Central School District #090 and Education Service Unit #9;
- (l) The hearing officer abused his discretion in excluding certain rebuttal evidence offered by petitioners herein at the time of the hearing which evidence was submitted as an offer of proof but which evidence can now be located as part of the transcript from the hearing below;
- (m) The said Final Decision and Order of the hearing officer is affected by error of law and is arbitrary and capricious in that it was made absent all the necessary parties being present before the hearing officer at the time the hearing occurred;
- (n) The said Final Decision and Order is con-

trary to law in that implementation of the Order would cause both petitioners herein to exceed their spending authority as provided by law.

WHEREFORE, your petitioners herein, and each of them, pray the Court to, upon a review of said Final Decision and Order reverse and vacate said Final Decision and Order with all costs taxed to the respondents, Marvin Deist and Myrtle Deist, and further pray the Court for such other and further relief as may be just and equitable.

ADAMS CENTRAL SCHOOL DISTRICT #090,
Adams County, Nebraska, and
EDUCATIONAL SERVICE UNIT #9,
Petitioners,

BY: BARLOW, JOHNSON, DeMARS &
FLODMAN, Their Attorneys
1227 "J" Street
P.O. Box 81686
Lincoln, Nebraska 68501
(402)475-4240

BY: s/ John F. Recknor
For the Firm

IN THE DISTRICT COURT OF ADAMS COUNTY,
NEBRASKA

ADAMS CENTRAL SCHOOL)	DOCKET 67
DISTRICT #090, Adams County,)	
Nebraska, and EDUCATIONAL)	PAGE 34
SERVICE UNIT #9,)	
)	
Petitioners,)	CASE NO. 20634
)	
V.)	
)	
MARVIN DEIST and MYRTLE)	ORDER
DEIST, and the NEBRASKA)	
DEPARTMENT OF EDUCATION,)	
)	
Respondents.)	

On the 14th day of May, 1981, the above captioned matter came on for trial before the Court. Appellants Adams Central School District, also known as District No. 90 of Adams County, Nebraska, and Educational Service Unit No. 9 were represented by their attorney, John F. Recknor, and the respondents, Marvin Deist and Myrtle Deist, were represented by their attorney, Jeff Jacobsen. Respondent Nebraska Department of Education filed an Answer herein but did not appear at the trial. Evidence was adduced and the Court being fully advised in the premises generally finds for petitioners and against respondents Marvin Deist and Myrtle Deist and further specifically finds as follows:

1. David Deist, minor child of respondents Marvin Deist and Myrtle Deist, was in an educational placement at the school for the Trainable Mentally Handicapped in Hastings, Nebraska, which school was being operated by Educational Service Unit No. 9, and edu-

cational services were being delivered by the school to said David Deist pursuant to a contract for services existing between Educational Service Unit No. 9 and Adams Central School District.

2. On or about December 27, 1977, Marvin Deist and Myrtle Deist placed said David Deist at the Hastings Regional Center without the prior knowledge and consent of or consultation with Adams Central School District or Educational Service Unit No. 9.

3. David Deist remained in the voluntary placement at Hastings Regional Center from approximately December 27, 1977 until approximately May 11, 1978, and during that period of time, Educational Service Unit No. 9, pursuant to its contract with Adams Central School District, provided educational services for said David Deist at the Hastings Regional Center.

4. On or about May 11, 1978 until March 10, 1980 said David Deist was in a placement at Nebraska Psychiatric Institute. This placement was made by Marvin Deist and Myrtle Deist without the prior knowledge and consent of or consultation with Adams Central School District or Educational Service Unit No. 9, and during that period of time educational services were provided to said David Deist, which educational services were paid for by Adams Central School District.

5. David Deist has not been in his educational placement as provided by an individualized educational plan, which plan was accepted and signed by Myrtle Deist on October 17, 1977, and he has remained out of that placement without the consent of Adams Central School District and Educational Service Unit

No. 9 from approximately December 27, 1977, through March 13, 1980, the final date of the hearing from which this appeal was taken.

6. The placements at Hastings Regional Center and Nebraska Psychiatric Institute constituted voluntary placements by Marvin Deist and Myrtle Deist for which Adams Central School District and Educational Service Unit No. 9 should not be obligated to pay.

7. That David Deist is entitled to educational services from Adams Central School District and Educational Service Unit No. 9 pursuant to his individualized educational plan which was accepted and signed October 17, 1977, and in effect before December 27, 1977.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that David Deist shall immediately be transferred from the Nebraska Psychiatric Institute, Omaha, Nebraska, and is entitled to receive educational services in the classroom for the school for the trainable mentally handicapped in Hastings, Nebraska, which is residential care to be provided by his parents Marvin Deist and Myrtle Deist; provided, however, that Marvin Deist and Myrtle Deist may elect to make such other placement of David Deist as they shall deem appropriate; and they are hereby directed to notify Gil Feis of Educational Service Unit No. 9 or Orwin White, Superintendant of Adams Central School District, of their intention to return David to the school for the Trainable Mentally Handicapped in Hastings, Nebraska, or of such other intention to not return him to said school, as their decision may be, within 40 days of the entry of this order. In the event they elect to have David Deist returned to the school for the Trainable Mentally Handicapped, transportation such as is

required to transfer him from Nebraska Psychiatric Institute to the residence of Marvin Deist and Myrtle Deist shall be provided by and paid for in full by Adams Central School District.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither Adams Central School District nor Educational Service Unit No. 9 shall be responsible for any payment of any residential expenses incurred by Marvin and Myrtle Deist for David Deist at the Hastings Regional Center or at the Nebraska Psychiatric Institute, or for any expenses of any nature except those which may have been or may be expressly provided for by any existing contract between Adams Central School District and Nebraska Psychiatric Institute; and Adams Central School District and Educational Service Unit No. 9 are hereby discharged from any obligation to provide any expense of any nature for said David Deist from December 27, 1977.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that that portion of the hearing officer's Final Decision and Order entered on or about September 22, 1980 directing Adams Central School District to provide David Deist with a free appropriate public education for a period of 16 months after David Deist's twenty-first birthday is hereby reversed and vacated.

The costs of this action shall be paid by the parties who have incurred them.

Dated this 12th day of June, 1981.

—C-10—

BY THE COURT:

s/ Fred Irons

District Judge

APPROVED AS TO FORM:

s/ John F. Recknor

Attorney for Petitioners

Attorney for Respondents

No. 83-224

In The
Supreme Court of the United States
October Term, 1982

ADAMS CENTRAL SCHOOL DISTRICT NO. 090 and
EDUCATIONAL SERVICE UNIT No. 9,

Petitioners,

vs.

MARVIN DEIST and MYRTLE DEIST,

Respondents,

IMPLEADED WITH NEBRASKA DEPARTMENT
OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

BRIEF IN OPPOSITION OF RESPONDENTS
MARVIN DEIST and MYRTLE DEIST

MARIE ASHE*
1341 North 41st Street
Lincoln, Nebraska 68503
(402) 464-8150

TIMOTHY F. SHAW*
LAURA R. PETOVELLO
Nebraska Advocacy Services
422 Lincoln Center Building
215 Centennial Mall South
Lincoln, Nebraska 68508
(402) 474-3183

Counsel for Respondents
Marvin Deist and Myrtle Deist

*Attorney of Record

September 9, 1983

QUESTIONS PRESENTED FOR REVIEW

Whether the Nebraska Supreme Court's application of state statute independently and adequately supports that court's ordering reimbursement to the parents of a multiply handicapped child for expenses which they incurred in procuring a residential educational program for that child after his wrongful expulsion from a special education program.

TABLE OF CONTENTS

	Pages
Questions Presented For Review	i
Table of Authorities	iii
Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Denying the Writ:	
I. Petitioners' Motion for Rehearing of this Case Is Presently Pending Before the Supreme Court of the State of Nebraska.	8
II. The Judgment of the Nebraska Supreme Court in this Case Is Supported Independently and Ad- equately by State Law.	8
III. The Judgment of the State Court Relative to the Questions Presented For Review Herein Does Not Conflict with Judgments of the Eighth Circuit Court of Appeals.	11
IV. The Order of the Nebraska Supreme Court Awarding Tuition Reimbursement to the Parents of an Unlawfully Expelled Handicapped Child and Denying Compensatory Education to Said Child Does Not Conflict with Federal Court Judgments.	14
Conclusion	17
Appendices:	
Appendix A	App. 1
Appendix B	App. 14

TABLE OF AUTHORITIES

	Pages
CASES:	
<i>Adams Central School District No. 090 v. Deist</i> , 214 Neb. 307, — N. W. 2d — (1983).....	6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
<i>Board of Education v. Rowley</i> , — U. S. —, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)	13
<i>Edelman v. Jordan</i> , 415 U. S. 651 (1974)	15
<i>Miener v. State of Missouri</i> , 673 F. 2d 969 (8th Cir. 1982)	11, 12, 13, 14, 15, 16, 17
<i>Monahan v. State of Nebraska</i> , 687 F. 2d 1164 (8th Cir. 1982)	11, 12, 13, 14
CONSTITUTION:	
Constitution of the United States, Eleventh Amendment	15, 16, 17
STATUTES:	
20 U. S. C. §§ 1401-1415	2, 3, 4, 8, 9, 12
Neb. Rev. Stat. §§ 43-601 to 43-666 (Cum. Supp. 1982)	2, 3, 9, 10
Neb. Rev. Stat. § 84-917 (Reissue 1981)	2, 6, 7
REGULATIONS:	
45 C. F. R. 121a.504 (1977)	2, 4
45 C. F. R. 121a.505 (1977)	2, 4

No. 83-224

In The
Supreme Court of the United States
October Term, 1982

ADAMS CENTRAL SCHOOL DISTRICT NO. 090 and
EDUCATIONAL SERVICE UNIT No. 9,

Petitioners,

vs.

MARVIN DEIST and MYRTLE DEIST,

Respondents,

IMPLEADED WITH NEBRASKA DEPARTMENT
OF EDUCATION,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA**

**BRIEF IN OPPOSITION OF RESPONDENTS
MARVIN DEIST and MYRTLE DEIST**

The respondents, Marvin Deist and Myrtle Deist, respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Nebraska Supreme Court in this case. That opinion is reported at 214 Neb. 307, — N. W. 2d — (1983).

JURISDICTION

Petitioners have invoked this Court's jurisdiction under 28 U. S. C. § 2101 and United States Supreme Court Rule 17.

The judgment of the Supreme Court of Nebraska in this case was entered on May 13, 1983. On June 10, 1983, petitioners filed a motion for rehearing of the case by the Nebraska Supreme Court. As noted in the Petition, at page 6, that motion for rehearing had not been decided by the Nebraska Supreme Court at the time of the filing of the Petition for Writ of Certiorari on August 10, 1983, and petitioners' motion for rehearing at this instant continues its pendency before the Nebraska Supreme Court. It therefore appears that the application for writ of certiorari has been brought out of time, fails to satisfy the requirements of United States Supreme Court Rule 20.4, and should be denied.

Respondents Marvin Deist and Myrtle Deist assert a lack of jurisdiction in this Court under United States Supreme Court Rule 17 for the reason that the decision of the Supreme Court of Nebraska in this case either fails to raise a federal issue or fails to decide a federal question so as to create a conflict with any other decision of a federal court of appeals.

STATUTES AND REGULATIONS INVOLVED

Federal Statutes and Regulations

20 U. S. C. §§ 1400, *et seq.*

45 C. F. R. §§ 121a.504, 121a.505 (1977).

State Statutes

NEB. REV. STAT. §§ 43-601 to 43-666 (Cum. Supp. 1982).

NEB. REV. STAT. § 84-917 (Reissue 1981).

STATEMENT OF THE CASE

Marvin Deist and Myrtle Deist, respondents [hereinafter, "Deists"], commenced this case in July 1979, as a special education administrative hearing before the Nebraska Department of Education. They brought their action pursuant to 20 U.S.C. § 1415 (1976) and NEB. REV. STAT. § 43-661 (Reissue 1978), on behalf of their son, David Deist, who was at that time a fifteen-year-old, multiply handicapped child suffering from mental retardation, autism, and epilepsy. The Deists named as respondents in their action the petitioners herein, Adams Central School District No. 090 [hereinafter, "school district"], the school district of residence of David Deist, and Educational Service Unit No. 9 [hereinafter, "ESU"], an agency which had provided special education services to David Deist pursuant to a contract between the ESU and the school district. The Nebraska Department of Education was also named as a respondent. The Deists alleged that David Deist had been deprived by the three respondents of the free, appropriate public education to which he was entitled under both state and federal law.

The Nebraska Department of Education was dismissed as a party during pre-hearing proceedings. An administrative hearing on the merits commenced on March 10, 1980, and a final decision and order were issued in September 1980. [Text of Final Decision and Order appears herein at Appendix A.] Evidence adduced at the administrative hearing established that David Deist had been enrolled in a special education program in Adams Central School District until sometime in December, 1977; that during the latter part of that month he had been ex-

pelled from school because of his disruptive behavior in class; that his expulsion amounted to a change in placement made in violation of 20 U.S.C. § 1415 and specifically in violation of the regulations applicable when a special education placement is changed, because the Deists had not received proper notice of the change or been advised of their right to a due process hearing to contest the change. See 45 C.F.R. 121a.504, 121a.505, complete texts of which appear at Appendix B. The evidence also showed that the school district, subsequent to his expulsion, offered him no alternative temporary or long-term placement. Faced with the school district's failure to offer any program for David Deist, the child's parents placed him, in late December 1977, at the Hastings Regional Center, a state-operated mental hospital located in Adams County, Nebraska. David Deist resided in a locked, adult male ward in that institution from December 1977 through May 1979, during which period of time the school district offered no alternative placement for him.

David Deist was totally deprived of any special education programming during much of his stay at the Hastings Regional Center. While the school district at times sent teachers to provide "homebound instruction" for David Deist in the hospital setting for periods of one to two hours per day, frequently there were no teachers available for that work and no such instruction was provided. When instructors were available, they were often persons without any teaching certification or special education skills. During the course of his institutionalization, David Deist deteriorated greatly and lost many of the language and social skills he had mastered prior to his Hastings Regional Center placement.

Evidence further established that in May 1979 the Deists were notified by Hastings Regional Center that that institution intended to discharge David Deist, believing that he was unsuitably placed there. Unable to find any other suitable placement for David Deist within the state of Nebraska and with the school district still offering no placement of any kind for the child, his parents removed David Deist to Nebraska Psychiatric Institute. That institution is a short-term psychiatric care facility located in Omaha, Nebraska, at a great distance from the Deist family home. David Deist remained a resident at Nebraska Psychiatric Institute from May 1979 until the administrative hearing on the merits of the special education appeal.

Based on the evidence adduced, the hearing officer found that David Deist had been unlawfully expelled from his special education placement in December 1977, in violation of state and federal regulations; that David Deist was in need of a residential placement as an element of an adequate educational program; and that his parents' placements of David Deist initially at the Hastings Regional Center and later at Nebraska Psychiatric Institute were not voluntary and unilateral placements, but were actions necessitated by the school district's expulsion of the child and its subsequent failure to offer any alternative placement for him.

The Order required that Adams Central School District provide a transfer of David Deist from Nebraska Psychiatric Institute to an appropriate residential placement; that the school district pay all the residential expenses which had been incurred at Hastings Regional

Center and at Nebraska Psychiatric Institute; and that compensatory education be provided David Deist for a period of 16 months after his 21st birthday.

The school district and the ESU elected to appeal the hearing officer's order within the state court system and petitioned for a review by the District Court of Adams County, Nebraska. The review was sought pursuant to NEB. REV. STAT. § 84-917 (Reissue 1981). [Text of the statute appears at Appendix B, herein.] A review was conducted by the district court; however, no record of the review proceeding was preserved. In June 1981, the District Court of Adams County reversed the rulings of the hearing officer. [The Order of the District Court appears at Petition, p. C-6.]

The Deists appealed from the district court determination to the Nebraska Supreme Court. On May 13, 1983, the Nebraska Supreme Court entered an order affirming in part and reversing in part the original order of the hearing officer. Specifically, the Nebraska Supreme Court affirmed those elements of the order which required that the school district provide a residential placement for David Deist and that David Deist's parents be reimbursed for the costs of the residential placements necessitated during the duration of his unlawful expulsion. The court reversed the hearing officer's order providing compensatory education, finding that the "clear and unambiguous language" of the Education for All Handicapped Children Act limits eligibility to children under age 21. *Adams Central School District v. Deist*, 214 Neb. 307 at 325, — N. W. 2d —, —, (1983) [hereinafter, *Deist*].

In June 1983, the school district and the ESU filed a Motion for Rehearing of the case by the Nebraska Supreme Court. That motion has been submitted and is pending decision by the Nebraska Supreme Court at this time.

The status of the Nebraska Department of Education throughout this case bears comment for purposes of clarification. That Department was originally named as a respondent by the Deists at the administrative hearing level, but was dismissed as a party at that stage. Subsequently, the Department was impleaded as a respondent by the school district and the ESU at the time of the review hearing in the state district court. The Nebraska Supreme Court appears to have taken the position that the Nebraska Department of Education was not a party whose interests were subject to definition by that body on appeal, presumably because of the limited nature of the review sought by the school district and the ESU under NEB. REV. STAT. § 84-917 [see Appendix B], and because of the fact that the Department had been dismissed as a party at the administrative level. The Department of Education made no appearance in the Nebraska Supreme Court, and, subsequent to the entry of the judgment in *Deist*, the Department requested and was granted by the Nebraska Supreme Court leave to file a brief, not as a party but as an *amicus*, on behalf of the school district's motion for rehearing.

REASONS WHY WRIT SHOULD BE DENIED

I. Petitioners' Motion for Rehearing of This Case is Presently Pending Before the Supreme Court of the State of Nebraska.

As noted in the foregoing JURISDICTION section, petitioners have filed their application for writ of certiorari during the pendency before the Nebraska Supreme Court of their motion for rehearing, which was submitted to that court on August 8, 1983, and which at this instant remains undecided. Petitioners have thus failed to comply with the requirements of United States Supreme Court Rule 20.4, which specifies that the time for the filing of a petition for certiorari shall commence with the date of the denial of rehearing or of the entry of a subsequent judgment upon rehearing. Absent a ruling by the Nebraska Supreme Court on petitioner's motion for rehearing, there exists no jurisdiction in this Court for a grant of certiorari.

II. The Judgment of the Nebraska Supreme Court in This Case is Supported Independently and Adequately by State Law.

The two Questions Presented for Review by the petition in this case raise the issues of whether and to what extent damages may be available under the Education for All Handicapped Children Act, 20 U. S. C. §§ 1401 *et seq.* [hereinafter, EAHCA]. However, the decision of the Nebraska Supreme Court in *Deist* with regard to those issues did not rely primarily upon considerations of federal law, but was independently and alternatively support-

ed by provisions of the Nebraska statutory scheme relating to services for handicapped children, NEB. REV. STAT. §§ 43-601 to 43-666 (Cum. Supp. 1982). Examination of the *Deist* opinion discloses on its face the adequacy and independence of the state ground.

In addressing the question whether reimbursement relief should be made available to the parents of David Deist, the Nebraska Supreme Court focused initially on its finding of fact that David Deist had been wrongfully expelled by the Adams Central School District from his special education placement. The Nebraska court based that finding on the school district's having deprived the Deists of the procedural protections mandated by 20 U. S. C. §§ 1401-1415, and the school district's having expelled David Deist on account of disruptive behavior, without having inquired into whether his disruptive behavior was in fact caused by his handicapped condition. *See Deist, supra*, at 321.

Having made the initial finding of an unlawful expulsion of David Deist, the Nebraska Supreme Court proceeded to examine the issues of the availability and the extent of appropriate damages. While it examined relevant federal statutory and case law for guidance, as it might examine the precedents of other jurisdictions, the Nebraska court relied specifically upon NEB. REV. STAT. § 43-662.01 (Cum. Supp. 1982). That statute provides that "the hearing officer shall prepare a final decision and order directing *such action as may be necessary*" [emphasis added]. *Deist, supra*. The court found in the state

statute an adequate ground for the award of damages by the administrative hearing officer.

The Nebraska Supreme Court, after analysis construing NEB. REV. STAT. § 43-662.01 as supporting an award of compensation when necessary, proceeded to consider whether the circumstances of the Deist matter justified the precise award ordered by the hearing officer, that is, whether the Deists were entitled to reimbursement for tuition expenditures. The court concluded that there did exist a factual basis sufficient to justify the hearing officer's award of reimbursement, consistent with the authority vested in that officer by NEB. REV. STAT. § 43-662.01, and based on the fact that the damages sustained by the Deists were caused by the school district's unlawful exclusion of David Deist from any educational program.

It has been the consistent practice of this Court, because of its respect for the independence of state courts, to refrain from reviewing the decisions of state courts where those decisions rest independently and alternatively on state statutory bases and do not necessarily raise a federal issue. Such is clearly the case in this matter.

While petitioners assert that a ruling by this Court is necessary to determine whether the Supreme Court of Nebraska has correctly construed EAHCA, such is not the case. In actuality, the Nebraska Supreme Court in *Deist* construed a state statute as providing for the award of compensation to the parents of an unlawfully expelled, handicapped child for expenses incurred as a direct result of the child's expulsion from school and the failure of the local school district to afford any alternative place-

ment for the child. That construction of the state statute by the Nebraska Supreme Court establishes an adequate and independent basis for the award of reimbursement to respondent Deists without raising any reviewable federal question.

III. The Judgment of the State Court Relative to the Question Presented For Review Herein Does Not Conflict With Judgments of the Eighth Circuit Court of Appeals.

If it is assumed, *arguendo*, that the judgment of the state court in *Deist* so relied on provisions of EAHCA that its construction of that statute presents a federal question, it is nonetheless clear that the court's interpretation of the Act does not conflict with constructions by the Eighth Circuit Court of Appeals so as to demand a clarifying review by this Court, contrary to petitioners' assertions.

Petitioners posit generally that monetary damages are not authorized under EAHCA and, specifically, that the holding in *Deist* is in clear conflict with the holdings of the Eighth Circuit Court of Appeals in the cases *Miener v. State of Missouri*, 673 F. 2d 969 (8th Cir. 1982) [hereinafter *Miener*] and *Monahan v. State of Nebraska*, 687 F. 2d 1164 (8th Cir. 1982) [hereinafter, *Monahan*]. Petitioners rely on that alleged conflict as a basis for review by this Court, and suggest that to allow the *Deist* decision to stand in the face of *Miener* and *Monahan* would leave all school districts in Nebraska without any definite body of law to follow.

In fact, review of the *Miener* and *Monahan* decisions immediately reveals the distinguishability of those cases, on their facts, from *Deist*, and the absence of any conflict among their holdings.

The *Miener* case was decided by the Eighth Circuit Court of Appeals in February 1982, and involved a claim for general damages asserted by the parents of a handicapped child under EAHCA and other federal statutes. The court denied an award of damages in *Miener*, finding a damage remedy not "generally intended" under EAHCA, and finding in that case an absence of such "exceptional circumstances" as might in other factual situations warrant a limited damage award. *Miener, supra*, at 980. In discussing "exceptional circumstances," the *Miener* court noted that these might include factors such as a school district's egregious failure to comply with the procedural provisions of EAHCA or risk to a child's physical health occasioned by the placement offered by a school district. *Miener, supra*.

The most significant difference between the factual situations presented in *Miener* and in *Deist* is that while the *Miener* court found no suggestion of exceptional circumstances, the Nebraska Supreme Court in *Deist* relied explicitly on the presence of two exceptional circumstances to support its affirmation of the limited damage award. Those circumstances were: first, the school district's failure to comply with the procedural provisions of 20 U.S.C. §§ 1401-1415; and, second, the threat to David Deist's physical and emotional health posed by his exclusion from any meaningful educational program as a result of his long-term, unlawful expulsion.

The first "exceptional circumstance" identified in *Deist* corresponds precisely to the first identified by the *Miener* court and discussed above, that is, an egregious deprivation of due process protections. The second exceptional factor present in *Deist* is more extreme than the second identified by *Miener*: David Deist was not merely threatened in some aspect of his physical well-being by a feature of an offered program; he actually experienced physical and emotional deterioration attributable to a total deprivation of meaningful programming upon his expulsion by the school district. In *Board of Education v. Rowley*, — U. S. —, 102 S. Ct. 3034 (1982), this Court noted that a primary purpose of EAHCA was to "open the door of public education to handicapped children," *Rowley, supra*, at 3043. In this case, the school district closed the door of opportunity to David Deist and abandoned him outside it.

A second distinction to be made between *Deist* and *Miener* is that while the plaintiffs in the latter case sought a general award of damages, the Deists sought and received precisely the type of "limited damage award" which the *Miener* court identified as "appropriate in special circumstances." *Miener, supra*, at 980.

The *Monahan* case, *supra*, the only other Eighth Circuit decision which petitioners cite as conflicting with *Deist*, was decided in August 1982 subsequent to *Miener*. While denying damages to plaintiffs in *Monahan*, the court specifically reiterated the position which it had asserted in *Miener*, that damages may be available "in exceptional circumstances not present here." *Monahan, supra*, at 1169.

The facts of the *Monahan* case differ from those of *Deist* in that the placement of his handicapped child for which the *Monahan* plaintiff sought reimbursement was truly a voluntary placement. That is, in *Monahan*, the parent had independently made a placement of his child even though an alternative program was offered by the local school district and was available at all times. The handicapped child in *Monahan* had not been expelled or otherwise totally excluded from access to an educational program, as was David Deist. Thus, *Monahan* did not present the "exceptional circumstances" which the Eighth Circuit Court in both *Monahan* and *Miener* identified as establishing a basis for damage awards.

In light of the clear distinguishability of these cases on their facts, it is evident that *Deist* presents no conflict with either *Monahan* or *Miener* on the issue of the availability of damages under the EAHCA, and that petitioners are clearly in error in their assertion that a review of *Deist* by this Court is required to resolve a conflict between Nebraska and federal courts on that issue.

IV. The Order of the Nebraska Supreme Court Awarding Tuition Reimbursement to the Parents of an Unlawfully Expelled Handicapped Child and Denying Compensatory Education to Said Child Does Not Conflict With Federal Court Judgments.

The second of petitioners' Questions Presented for Review asserts an inconsistency in the Nebraska Supreme Court's award of tuition reimbursement to David Deist's parents, on the one hand, and its declining to award com-

pensatory education past David Deist's 21st birthday, on the other. Petitioners suggest that this judgment of the Nebraska Supreme Court conflicts with the case law of the Eighth Circuit, citing the *Miener* case, *supra*, in support of that contention.

In *Miener*, the court discussed the question of the types of damages which may be available *against a state* and the types which may be barred by virtue of a state's Eleventh Amendment immunity. Within the context of discussion of the scope of Eleventh Amendment immunity and exceptions to such immunity, the *Miener* court offered an analysis which distinguished between prospective and retrospective damages. Basically, the court reiterated the case law established in *Edelman v. Jordan*, 415 U.S. 651 (1974), and stated the position that while prospective relief may be ordered against a state as an exception to Eleventh Amendment immunity, retrospective relief will not be permitted because of Eleventh Amendment constraints. The court concluded that the Eleventh Amendment would bar the award *against a state* of both compensatory education orders and tuition reimbursement orders, for the reason that both may be viewed as forms of retrospective relief.

The damages issue in *Deist* is very different from the one discussed in *Miener* for the reason that *Deist* presents no Eleventh Amendment immunity issue. The Nebraska Supreme Court order was directed against the school district and not against the state. Further, in *Deist* no party has ever raised any claim to Eleventh Amendment immunity. The Petition has not drawn into question the con-

stitutionality of any Act of Congress or of any statute of the State of Nebraska, and petitioners have neither articulated an Eleventh Amendment issue in their Questions Presented for Review nor satisfied the requirements of United States Supreme Court Rules 28.4(b) and 28.4(c). Because of the absence of that issue in *Deist*, the Eighth Circuit analysis of the Eleventh Amendment question has no clear or direct bearing on the determination by the Nebraska Supreme Court.

In the absence of an Eleventh Amendment issue, the Nebraska Supreme Court simply held that eligibility for the educational services mandated by EAHCA ends when a student reaches the age of 21, and that, therefore, relief in the form of an order for appropriate educational services could not extend beyond a student's 21st birthday. The Nebraska Supreme Court made no reference to prospective or retrospective relief because no Eleventh Amendment issue was presented to the court. Petitioners have explicitly acknowledged the limitations of their argument. See Petition, p. 13. They are essentially asking the Court to review an abstract issue and to compare not real inconsistencies in judgment, but rather, differences in the approaches and in the general principles utilized by the state court in *Deist* and by the federal court in *Miener* in those courts' analyses of different issues.

In essence, petitioners are urging this Court to dictate that the Nebraska Supreme Court, rather than making a practical construction of the relevant statutory language, as it did, *Deist*, *supra*, at 321, ought to have applied to the issue of compensatory education precisely the analy-

tical model which *Miener* utilized in its treatment of the compensatory education issue within the context of Eleventh Amendment immunity considerations.

Petitioners have not cited to a single case involving a judgment in clear conflict with that of the Nebraska Supreme Court in its order of tuition reimbursement and its denial of compensatory education. Rather, they have isolated out of its context the *Miener* determination that compensatory education could not be ordered *against a state* and have urged this Court to hold that the Nebraska Supreme Court erred in not reaching an identical judgment relative to a non-state party.

When they urge this Court to find that identical models of analysis ought to have been applied by two different courts in the handling of different issues, petitioners are actually seeking what would amount to an advisory opinion rather than a clear judicial determination. The absence of a clear conflict between the Nebraska Supreme Court judgment and that of any federal court warrants this Court's determination that no reviewable issue has been raised in the second Question Presented.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MARIE ASHE*

1341 North 41st Street
Lincoln, Nebraska 68503
(402) 464-8150

TIMOTHY F. SHAW*

LAURA R. PETOVELLO

Nebraska Advocacy Services
422 Lincoln Center Building
215 Centennial Mall South
Lincoln, Nebraska 68508
(402) 474-3183

*Counsel for Respondents Marvin
Deist and Myrtle Deist*

*Attorney of Record

App. 1

APPENDIX A

**BEFORE THE NEBRASKA DEPARTMENT
OF EDUCATION**

Case No. 79-08

MARVIN DEIST and MYRTLE DEIST,
Petitioners,

vs.

**ADAMS CENTRAL SCHOOL DISTRICT NO. 090,
ADAMS COUNTY, NEBRASKA, EDUCATIONAL
SERVICE UNIT #9, and the NEBRASKA DEPART-
MENT OF EDUCATION,**

Respondents.

FINAL DECISION AND ORDER

I.

APPEARANCES

Present at the hearing in this matter which commenced on March 10, 1980, at Educational Service Unit # 9, Hastings, Nebraska, were the Petitioners, Marvin Deist and Myrtle Deist, and their attorneys, Tim Sindelar and Marie Ashe, both of Lincoln, Nebraska.

Orwin White, Superintendent of Adams Central School District, Respondent, and Gil Feis, State-Federal Programs Director of Educational Service Unit #9, Respondents, were present with their attorney, John Recknor of Lincoln, Nebraska.

II.

JURISDICTION

This action was brought by the Petitioners under Nebraska Statute § 43-661, R. R. S. 1943, and 20 U. S. C. § 1415 of the Education of the Handicapped Act.

III.

ISSUES PRESENTED FOR FINAL DECISION

The issues presented to the Hearing Officer were many. However, in the final analysis, the numerous issues presented can all be classified under three general issues:

(1) What constitutes a free appropriate education for David Deist?

(2) Has the education provided David Deist since December, 1977 constituted a free appropriate public education?

(3) If David Deist has not received a free appropriate public education from and after December, 1977, is he entitled to any remedy, and if so, what remedy?

IV.

SPECIFIC FINDINGS OF FACT

A. FINDINGS RELATING TO JURISDICTION

This tribunal has jurisdiction over the subject matter of all Petitioners' claims against Respondents and jurisdiction over the persons of all named parties in the caption of this matter with the exception of the Nebraska

App. 3

Department of Education, which has been dismissed from this action.

B. FINDINGS RELATING TO THE ISSUES

A significant body of documentary evidence and testimony has centered on the issue of David Deist's primary diagnosis. The question of whether David is primarily autistic, as opposed to mentally retarded, has been a much discussed topic. No finding is made with respect to this debate. Resolution of this issue is unnecessary in this matter. Regardless of the primary diagnosis, it is unquestioned that David Deist is a multihandicapped child with extensive educational needs. It is these needs which are more clearly at issue. Also at issue is the extent to which Respondents may be compelled to meet those needs.

The needs of David are obviously many. The IEP of September 18, 1979, implemented by Respondents without the consent of Mr. and Mrs. Deist appears to satisfactorily address David's many needs with only one exception, that being the injection of a community based residential placement.

The evidence in this matter is uncontroverted that David is in need of residential placement to complement and complete his existing IEP. Dr. John McGee, Dr. Michael O'Neill, and Dr. Frank Menolascino each testified unequivocally that residential placement should be an integral part of David's education.

The Hearing Officer therefore finds that residential placement in or near this community is a necessary element of free and appropriate public education to which David Deist is entitled under the law.

A second issue presented is the adequacy of David's education since his removal from the TMR (Trainable

Mentally Retarded) School in December, 1977. His education is seen in two separate phases, the first being his placement in the Hastings Regional Center from January, 1978 through May 11, 1979 and the second extending from May 11, 1979, when David was transferred to the Nebraska Psychiatric Institute in Omaha to the time of the hearing in this matter.

During David's placement at the Hastings Regional Center, he resided in a locked adult male ward, although he was not kept there at all times during the day. For the better part of his stay, he received between one and two hours of homebound instruction per day. Little or no progress was noted. If anything, David regressed. Dr. Michael O'Neill testified that in his opinion, two hours per day of homebound instruction was inadequate for David's needs. The record reflects nothing to contradict this opinion. This leads the Hearing Officer to the conclusion that David's education at the Hastings Regional Center undeniably failed to meet his right to a free appropriate public education.

David's residence at the Nebraska Psychiatric Institute has been another matter. It appears to have been quite appropriate, except for the absence of a proper residential placement. Progress has been noted to the extent that David is now, and has been for some time, ready for transfer to this community. This proposed transfer contemplates residential placement.

The final issue presented for consideration is directly related to the second issue. Having determined the inappropriateness of at least a part of David's past education, what relief may be afforded? Petitioners first

App. 5

asked that Respondents be required to pay all residential expenses incurred at the Hastings Regional Center for David's placement. They secondly request an Order requiring Respondents to provide compensatory education beyond the age of 21. The specific findings in connection with these requests are as follows:

(A) Residential placement in a public or private program is necessary to meet David Deist's special education needs.

(B) This necessity arose in December, 1977 and January, 1978 and continued to exist through the time of the hearing in this matter.

(C) The public residential placement at the Hastings Regional Center has been unsatisfactory in terms of special education services provided, and in terms of the placement itself.

(D) The public residential placement at the Nebraska Psychiatric Institute has been satisfactory in terms of special education services provided, but has not been the least restrictive environment.

(E) Residential expenses have been incurred at both institutions.

(F) Mr. and Mrs. Deist, Petitioners, made both placements without the knowledge or consent of Respondents.

(G) Petitioners' placement of David at the Hastings Regional Center in January, 1978 is directly attributable to Respondents' wrongful removal of David Deist from the existing special education program at the TMR School in December, 1977.

App. 6

(H) Respondents' removal of David from the TMR School in December, 1977 constituted a change in David's educational placement, as well as a change in the manner of providing him a free appropriate public education.

(I) Petitioners' placement of David at the Nebraska Psychiatric Institute in May, 1979 is directly attributable to David's regression at Hastings Regional Center and failure to obtain a satisfactory community based residential placement for David.

(J) David's placements at Hastings Regional Center and at Nebraska Psychiatric Institute were not for medical reasons.

V.

CONCLUSIONS OF LAW

David Deist was wrongfully removed from the TMR School in December, 1977. His parents were not given proper notice of this change in placement. See 45 C. F. R. § 121a.504(a). Nor was the removal accomplished in accordance with the then existing Nebraska Department of Education Rule 51. See NDE Rule 51-(5)(a), effective August 16, 1977 (Exhibit 22). David's removal was in fact an unlawful expulsion. *Stuart v. Nappi*, 443 F. Supp. 1235 (1978).

David was placed in Hastings Regional Center soon thereafter, and his special education was in a holding pattern at best. He was not receiving, during his stay at the Regional Center, a free appropriate public education as defined in 20 U. S. C. § 1401(18), in any respect. The

App. 7

removal of David to the Nebraska Psychiatric Institute in May, 1979 improved his situation, but in light of the evidence and the "least restrictive environment" requirements of state and federal law, he was still not receiving the free appropriate public education to which he is entitled. NDE Rule 51-(6)(a), effective November 9, 1978; 45 C. F. R. § 121a.550 et seq.

Given the foregoing, the final determination to be made is the propriety of the relief sought by Petitioners. They first ask that David be placed in a community based residential placement at the expense of the local school district.

Where it is determined that residential placement is necessary to provide special education and related services to a handicapped child, it shall be done at no expense to the parents. 45 C. F. R. § 121a.302.

While ultimate responsibility for payment of the costs attendant to a residential placement lies with the State Department of Education (45 C. F. R. § 121a.600), the immediate responsibility lies with the local school district which, in this case, is Adams Central School District. *Ladson v. Board of Education of D. C.*, — F. Supp. — (D. D. C., March 12, 1979), 3 EHLR 551:188; *North v. D. C. Board of Education*, 471 F. Supp. 133 (1979).

David's right to residential placement in or near this community, at the expense of the Adams Central School District, is well founded in the facts and in the law.

Petitioners also seek relief in the nature of an Order by this Hearing Officer directing the Respondents to pay the expenses of residential care incurred during David's

stays at the Hastings Regional Center and the Nebraska Psychiatric Institute. In addition, they have requested compensatory education for David beyond age 21.

The relief sought is in the nature of money damages. One court has held that the Education of the Handicapped Act (20 U. S. C. 1401 et seq.) does not imply a cause of action for money damages. *Loughran v. Flanders*, 470 F. Supp. 110 (1979). The majority of courts, however, recognize a right to assert a claim for money damages. *Doe v. Koger*, 480 F. Supp. 225 (1979); *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104 (1979).

The court in *Boxall* specifically held that the Education of the Handicapped Act authorizes an award for damages, when appropriate. *Id.* at 1112. The court looked to the legislative intent and found the following discussion:

Such action may be brought in any State court of competent jurisdiction or in any district court of the United States and in any such action the court shall receive the records of the due process hearing (and where appropriate the records of the review of such hearings), shall hear additional evidence at the request of any party, shall make an independent decision based on the preponderance of the evidence, and *shall grant all appropriate relief*. (Emphasis added.) Joint Explanatory Statement of the Committee of Conference, in Senate Conference Report No. 94-455, p. 50, reprinted in (1975) U. S. Code Cong. and Admin. News, pp. 1425, 1503.

This comment should be compared with recently enacted LB 855 (which amended Nebraska Statute § 43-662, R. R. S. 1943), which states that “. . . the Hearing Officer shall prepare a final decision and order directing such action as may be necessary. . . .”

Doe v. Koger, supra, is somewhat similar to David Deist's situation. A handicapped child was expelled from school due to disruptive behavior. The court stated that a school district has the same authority to expel handicapped children as it does to expel nonhandicapped children. However, the Education of the Handicapped Act does impose upon the school district a duty to make an independent determination of whether the disruptive behavior, which is the cause for the disciplinary action, is attributable to the child's handicap. If so, expulsion is inappropriate. Rather, the school district in that event must seek to place the child in an appropriate, more restrictive environment. The court noted that disruptive behavior may often be attributable to an existing inappropriate placement.

The court went on to suggest by way of dicta certain prerequisites to any recovery of damages. They appear to be:

- (1) Expulsion by the school district caused the child to lose education;
- (2) The child would not have been expelled if the Education of the Handicapped Act had been followed; and,
- (3) The child's propensity to disrupt was the result of the child's inappropriate placement. *Doe* at p. 229.

The record clearly shows that all three parts of the foregoing test are met in the case of David Deist. See also *S-1 v. Turlington*, — Fed. 2d — (5th C. C. A. 19), 3 EHLR 551:572.

Even though the foregoing test is satisfied, parents do not have an unrestricted right to transfer their chil-

dren to another placement. The placements at the Hastings Regional Center and Nebraska Psychiatric Institute were both made unilaterally by David's parents without prior knowledge or consent of Respondents. The Fourth Circuit of the United States Court of Appeals recently held that such a unilateral move by the parents precludes them from any right to look to the school board for payment of such expenses. *Stemple v. Board of Education of Prince George's County*, 623 Fed. 2d 893 (1980).

The facts in *Stemple*, however, are distinguishable from the Deists' situation. The initial conduct of the Respondents in removing David from the TMR School, and the subsequent failure to find proper placement for David for a great length of time while he was at the Hastings Regional Center precipitated the conduct of the Deists. The conduct of the Deists was not so much "unilateral," at [sic] it was a logical result of the conduct of the Respondents. See *Board of Education of the Town of Manchester v. Connecticut State Board of Education*, — A. 2d — (Conn. Sup. Ct., February 26, 1980), 3 EHLR 551:556.

The question remains then of what relief is appropriate and necessary under the facts of this case. Residential placement of David Deist has been a necessity since December, 1977. This is a part of the free appropriate public education which is to be provided at no expense to the parents. 45 C. F. R. § 121a.302. It follows then that an Order directing the school district to pay the residential expenses incurred at the Hastings Regional Center and the Nebraska Psychiatric Institute is both appropriate under the circumstances and necessary to give full effect to the Education of the Handicapped Act. The school district is, of course, entitled to look to any insurer or

similar third party for coverage or reimbursement where appropriate. 45 C. F. R. § 121a.301.

The other damage-related type of relief requested by Petitioners is compensatory education for David beyond age 21. This type of relief has little precedent. Petitioners cite as authority for this request *Boxall v. Sequoia Union High School District, supra*, and *Mattie T. v. Holaday*, — F. Supp. —, (N. D. Miss., January 26, 1979), 3 EHLR 551:109. *Boxall*, as already stated, holds generally that damages may be awarded under the Education of the Handicapped Act. It does not, however, suggest what types of relief may or may not be appropriate. No reference is made therein to future compensatory education.

Mattie T. is a consent decree wherein future compensatory education beyond age 21 was granted in certain circumstances. Unfortunately, no discussion of the issue is found in the case, and it is therefore of little practical help in the case at bar.

The basis for requesting compensatory education beyond age 21 is the inadequate education David received while at the Hastings Regional Center. There can be no question that David lost something, and it is something which may be lost forever. Lost education has been termed "irreparable harm." *Doe v. Koger, supra*. Time and opportunity have been lost. Nevertheless, it is intriguing to consider the possibility of restoring to David this lost time and opportunity over some period in the future. The facts of this case and the nature of David's disabilities lend themselves to this type of relief.

David has needed, while at the Regional Center, and continues to need, a very structured special type of education which includes residential placement. There is no reason to believe that David could not benefit from such education beyond the age of 21. Such relief, while not specifically authorized in state or federal legislation, is certainly compatible with the declared spirit and intent of such legislation. § 43-641 R. R. S. 1943; 20 U. S. C. 1401, et seq. Such relief is appropriate under the circumstances and is necessary to effect a realization of a free appropriate public education for David.

The foregoing findings and conclusions are not meant to suggest in any way that Respondents have ignored David or given his needs less than their full attention. Their sincere concern and continuous cooperation with the Deists demonstrates unquestionable good faith. Nevertheless, David was provided something less than a free appropriate public education while at the Hastings Regional Center.

There have been courts which have denied similar relief to parents where good faith has been demonstrated on the part of the school district. *Laura M. v. Special School District No. 1*, — F. Supp. — (D. Minn., January 21, 1980), 3 EHRLR 552:152; *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (1977). In this case, however, the lack of accomplishment has served to erode the good faith. The underlying purpose of the Education of the Handicapped Act is to place the burden of a free appropriate public education upon the state education agencies, and in turn, the local school district. This burden dictates accomplishment of those goals by those agencies responsible.

Respondents in their Brief place much emphasis on their extraordinary efforts in connection with this matter. They take the position that they have done all they are able to do. In the first place, it is certainly not clear that they have exhausted all possible avenues. Secondly, and more importantly, the lack of staff or facilities does not excuse the local school district from its duty to provide a free appropriate public education. *Sherry v. New York State Education Department*, 479 F.Supp. 1318 (1979). The burden of providing David Deist with a free appropriate public education remains with the Adams Central School District.

VI.

ORDER

IT IS, THEREFORE, ORDERED AS FOLLOWS:

(1) David Deist shall immediately be transferred from the Nebraska Psychiatric Institute, Omaha, Nebraska, to a residential placement sufficient to meet David's unique needs, all at the expense of Adams Central School District No. 090;

(2) Adams Central School District No. 090 shall be responsible for payment of all residential expenses incurred by David Deist at the Hastings Regional Center and the Nebraska Psychiatric Institute; and

(3) Adams Central School District No. 090 is hereby directed to provide David Deist with a free appropriate public education for a period of sixteen (16) months after David's 21st birthday.

This Order shall take effect thirty (30) days after receipt of a copy of same by the parties.

Dated: September 22, 1980.

/s/ Michael E. Sullivan,
Hearing Officer

APPENDIX B

Nebraska Revised Statutes (Reissue 1981)

84-917. *Agency; final decision; appeal; district court; procedure.* (1) Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review under sections 84-917 to 84-919. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.

(2) Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served as in other actions except that a copy of the petition shall be served upon any such agency together with the summons. The court, in its discretion, may permit other interested persons to intervene.

(3) The filing of the petition or the service of summons upon such agency shall not stay enforcement of a decision. The agency may do so, or the court may order a stay after notice to such agency of application therefor, upon such terms as it deems proper, and may require the party requesting such stay to give bond in such amount and conditioned as the court may direct.

(4) Within fifteen days after service of the petition or within such further time as the court for good cause shown may allow, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it including the final decision sought to be reversed,

vacated, or modified. Any deposition or exhibit introduced in the agency proceeding shall, upon demand of the party who introduced it, be returned to such party for use in the proceedings for review.

(5) The review shall be conducted by the court without a jury on the record of the agency.

(6) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:

- (a) In violation of constitutional provisions;
- (b) In excess of the statutory authority or jurisdiction of the agency;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;
- (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or
- (f) Arbitrary or capricious.

(7) The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal.

Source: Laws 1963, c. 531, § 1, p. 1664; Laws of 1969, c. 838, § 2, p. 3162.

Nebraska Revised Statutes (Cum. Supp. 1982)

43-662. *State Department of Education; conduct hearings; hearing officers; employed; qualifications.* The

State Department of Education shall conduct hearings, initiated under section 43-661, using hearing officers. The State Department of Education may employ, retain, or approve such qualified hearing officers as are necessary to conduct hearings provided by sections 43-626, 43-627.01, and 43-661 to 43-668. The hearing officers shall not be persons who are employees or officers of a state or local public agency which is involved in the education or care of the child. A person who otherwise qualifies to conduct a hearing under sections 43-626, 43-627.01, and 43-661 to 43-668 is not an employee of the agency solely because the person is paid by the agency to serve as a hearing officer. No hearing officer shall participate in any way in any hearing or matter in which the hearing officer may have a conflict of interest.

Source: Laws 1978, LB 871, § 5; Laws 1980, LB 855, § 1. Effective date July 19, 1980.

43-662.01. *Hearing; hearing officer; report; contents; final decision and order; delivery.* Upon the receipt of a petition, the State Department of Education shall assign it to a hearing officer. The hearing officer shall receive all subsequent pleadings and shall conduct the hearing. At the hearing the parties shall present evidence on the issues raised in the pleadings. At the completion of the proceedings the hearing officer shall prepare a report based on the evidence presented containing findings of fact and conclusions of law. Within forty-five days after the receipt of a request for a hearing, the hearing officer shall prepare a final decision and order directing such action as may be necessary. At the request of either party the hearing officer may grant specific extensions of time

App. 17

beyond this period. The report and the final decision and order shall be delivered via certified mail to each party or attorney of record and to the Commissioner of Education.

Source: Laws 1980, LB 855, § 2. Effective date July 19, 1980.

45 C. F. R.

§ 121a.504 *Prior notice; parent consent*

(a) *Notice.* Written notice which meets the requirements under § 121a.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handi-

capped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2) (i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in §§ 121a.506-121a.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under §§ 121a.510-121a.513.

§ 121a.505 *Content of notice.*

(a) The notice under § 121a.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.